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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSE LEONARDO CONTRERAS-SUBIAS

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process and Double Jeopardy provisions of the United States Constitution and former Federal Rule of Criminal Procedure 35(a) bar the "reforming" or "correcting" of an alleged illegal sentence to a defendant's prejudice and restrict the sentencing court to deletion of the illegal portion of the sentence only.

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The petitioner, Jose Leonardo Contreras-Subias, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 7 January 1994.

I.

PARTIES TO THE ACTION BELOW

The parties to the action in the Court of Appeals were petitioner and respondent United States of America.

II.

OPINION BELOW

On 7 January 1994, the Court of Appeals entered its published opinion sustaining the action of the trial court in "reforming" or "correcting" the sentence originally imposed upon petitioner. A copy of the 7 January 1994 opinion is attached hereto as Appendix A.

III.

JURISDICTION

On 7 January 1994, the Court of Appeals entered its published opinion sustaining the trial court's action of "reforming" or "correcting" the sentence

imposed upon petitioner. Jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law. . . .

Former Federal Rule of Criminal Procedure 35(a):

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

V.

STATEMENT OF THE CASE

On October 29, 1990, in the United States District Court for the Southern District of California, petitioner pled guilty to charges of conspiracy to possess marijuana with intent to distribute and money laundering. These guilty pleas were entered pursuant to a written plea agreement between the parties (Appellant's Excerpt of Record, hereafter "AER," 1-5). At the time of said pleas, petitioner was already serving sentences for convictions in other districts, as follows:

1. Central District of California: ten-year term (imposed 8/88).

2. Central District of California: three-year term, consecutive to term (1) (imposed 12/88).

3. District of Utah: five-year term, concurrent with term (1) (imposed 8/89).

4. Eastern District of Oklahoma: fifteen-year term, concurrent with terms (1) and (2) (imposed 6/89).

As an alleged consequence of these sentences, petitioner was serving a fifteen-year term.

The plea agreement in the Southern District case called for a sentence "producing the effect of a term of thirty years measured from April 1, 1988, the date of defendant's arrest in Salt Lake City, Utah." (AER 2.) This term was to be achieved by giving petitioner a fourteen-year, three-month term (with additional credit for the nine months petitioner spent in custody between his April 1, 1988, arrest and initial

conviction) to be served consecutive to the fifteen-year term imposed by the Oklahoma District Court. The language used in the plea agreement and in the District Court's December 10, 1990, judgment and commitment order specified that petitioner serve his Southern District sentence consecutive to the Oklahoma term and concurrent to the terms imposed in the Central District of California and the District of Utah. These terms were themselves concurrent to the Oklahoma term. In effect, petitioner's Southern District sentence would have to be served twice beginning immediately, as a concurrent term to the California and Utah sentences; and then again, as a consecutive term to the Oklahoma sentence.

The written plea agreement

specifically preserved petitioner's right "to move the court to reduce or correct the sentence pursuant to [former] Rule 35, Federal Rules of Criminal Procedure." (AER 4.) In a motion in propria persona filed August 13, 1991, and by supplemental memorandum filed by counsel herein on November 4, 1991, petitioner moved for the striking of the Southern District term in its entirety on the grounds that said term violated petitioner's due process and double jeopardy protections and that the jurisdiction of the court to correct the illegal sentence was confined under former Rule 35 to the elimination of the illegal portion of the contested sentence. After a protracted delay, and the filing of additional memoranda of law by the parties, the trial court found that the sentence at issue was invalid in

its entirety as "internally ambiguous or self-contradicting." (AER 150.) Thus, the court held that the petitioner could be completely resentenced and ultimately resolved the double jeopardy dilemma by simply rendering the Southern District sentence consecutive to the Oklahoma term and deleting any reference to the other terms imposed (AER 166). This "corrected" judgment was entered on November 16, 1992, and petitioner filed a timely notice of appeal therefrom on November 25, 1992.

On appeal, the Ninth Circuit ruling validated the determination of the trial court and accepted the proposition that the original sentence was so ambiguous as to be illegal, and "correction of an illegally ambiguous sentence does not violate double jeopardy because the

initial ambiguous sentence is of no effect."

The Appellate Court further held that petitioner had no legitimate expectation of finality as to the "concurrent" portion of his original sentence. As to this issue, petitioner had pointed out that a significant purpose of the double jeopardy and Rule 35 limitation on the power to "correct" sentences is to forestall a situation where "a defendant may be deterred from calling the court's attention to an error for fear of subjecting himself to greater punishment." United States v. DeLeo, 644 F.2d 300, 302 (3d Cir. 1981). The Court of Appeals addressed this contention by asserting that "this is not a case where we need fear establishing a rule which penalizes defendants for

challenging illegal sentences. . . ." Having said that, the court did in fact "penalize" the petitioner for raising the issue by holding that he had no "expectation of finality" in the lawful portion of the sentence because "Contreras-Subias realized his sentence was illegal, and challenged its validity."

VI.

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court Below Wrongfully Erodes the Right of a Criminal Defendant to Challenge Unlawful Portions of a Sentence which Violated Double Jeopardy and Due Process Protections.

The instant petition raises serious questions regarding the jurisdictional authority of a sentencing court to "correct" or "amend" a previously imposed

sentence as to which the defendant has begun serving the term. As long ago as 1873, this Honorable Court posed the following question and answer:

> [C]an the court vacate an [illegal] judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on the same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice but put to actual punishment twice for the same thing.

Ex Parte Lange, 85 U.S. 163, 175 (1873).

In United States v. Benz, 282 U.S. 304, 306-07 (1930), the court reiterated that criminal judgments are generally subject to amendment or modification provided that the punishment not be augmented and provided that "a punishment already partly suffered be not increased."

Prior to the instant case, the Ninth

Circuit had established a clear rule that former Federal Rule of Criminal Procedure 35(a) restricts the trial court's power to "correct" a sentence to the illegal portions thereof. Kennedy v. United States, 330 F.2d 26, 27 (9th Cir. 1964); United States v. Jordan, 884 F.2d 1297 (9th Cir. 1989). Both Kennedy and Jordan held that a trial court lacks jurisdiction under former Rule 35(a) to "increase or make more severe the valid portions of the sentence originally imposed . . . where, as here, service of the legal portions of the sentence has commenced." Kennedy, supra, 330 F.2d at 27; Jordan, supra, 884 F.2d at 1298.

The Court of Appeals circumvented this constitutional and statutory restriction by holding that the subject sentence was facially ambiguous and thus

wholly unlawful. The error in this analysis is that the sentence and judgment is not ambiguous on its face, but was rendered illegal only by reference to an extrinsic fact, i.e., that the Oklahoma, Central District, and Utah sentences were made concurrent to one another in those respective courts. Thus, the true problem with the sentence imposed was not its facial illegality but the fact that the sentence intent of a thirty-year term could not be carried out without violating petitioner's double jeopardy rights.

The fact that a sentencing court's intent cannot be carried out does not, as a matter of law, free the court to "restructure" a commenced sentence to the prejudice of the defendant. United States v. Welty, 426 F.2d 615 (3d Cir.

1970); Pugliese v. United States, 353 F.2d 514 (1st Cir. 1965); United States v. Turner, 518 F.2d 14, 17 (7th Cir. 1975). Further, the concept of a defendant's "expectation of finality" has been historically based upon a notion of fundamental fairness to criminal defendants who "may legitimately expect that the sentence, once imposed and commenced, will not later be enhanced." United States v. Jones, 722 F.2d 632, 638-39 (11th Cir. 1983). Stated alternatively, the due process provision is violated if the court undertakes "to alter even an illegal sentence in a way which frustrates a prisoner's expectations by postponing his parole eligibility or release date far beyond that originally set." United States v. Lundien, 769 F.2d 981, 987 (4th Cir.

1985). The record herein reflects that under the concurrency provisions of petitioner's Southern District sentence, he was granted a mandatory or presumptive release date in 1996. That release date was effectively eliminated by the sentence "correction" effected by the trial court. The only two exceptions to the rule that the legitimate expectations of a sentenced defendant must be honored are the situations when the defendant himself has misled the trial court as to essential sentencing factors, or where the sentence itself is subject to appeal by the government and potential modification as a result of said appeal. Jones, supra, 722 F.2d 638-39; United States v. DiFrancesco, 449 U.S. 117 (1980). Neither of these exceptions are factually applicable to the instant case.

The true significance of the appellate opinion herein is that it invites the trial court, whose sentencing intent is frustrated by legal error not attributable to the defendant, to circumvent the constitutionally protected "expectation of finality" by the simple expedient of declaring the original sentence to be facially "ambiguous" and therefore subject to fundamental reconstruction. The opinion further exemplifies the penalizing of a defendant for presuming to challenge an unquestionably illegal sentence.

By virtue of these considerations, counsel for petitioner respectfully submits that the instant case merits the scrutiny of this Honorable Court on the grounds that the opinion below constitutes a decision in conflict with

established precedent of this court, as well as construing authority from other circuits.

VII.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Date: 4-22-91 Respectfully submitted

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